


# Game Change: Understanding Exchanges & 2014 Health Plan Rules

Employee Benefits Planning Association  
Breakfast Seminar

*Presented by:*  
Howard Bye-Torre, Attorney  
Stoel Rives LLP



THURSDAY, DECEMBER 5, 2013 • SEATTLE

---

---

---

---

---

---

---

---

## Today's Topics

- Exchanges/Marketplaces
- DOMA and the *Windsor* Decision
- New HIPAA Privacy Rules
- New HIPAA Wellness Program Rules
- \$500 Carryover for Health FSAs
- Health Care Reform Rules for 2014
- Mental Health Parity

2

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013




---

---

---

---

---

---


---

---

## ACA Exchange

- Mechanism for organizing the health insurance marketplace to help consumers and small businesses access affordable insurance coverage
- Mitigate adverse selection
  - Essential health benefits for all plans
  - Single risk pool for individual market plans
  - Same plan, same premium (inside and outside)<sub>3</sub>

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013




---

---

---

---

---

---

---

---

## ACA Exchange

- “An Exchange shall make available qualified health plans to qualified individuals and qualified employers”
- All states required to have one by 2014
  - State exchange
  - Partnership exchange
  - Federally facilitated exchange

4

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

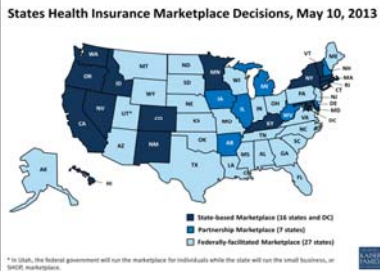
---

---

---

---

## State Exchanges: The Stats



5

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

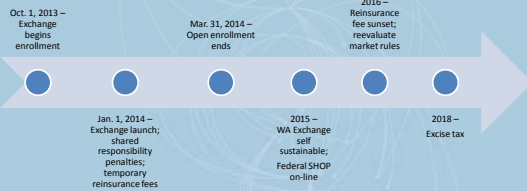
---

---

---

---

## Timing



6

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

## Federally Facilitated Exchanges

- Carriers applied to HHS to certify their plans as QHPs for inclusion on the FFEs
- Carriers and plans vary by state
- FFEs are run by HHS on healthcare.gov
- Problems with healthcare.gov rollout
  - Could not handle the volume of traffic
  - Trouble verifying IDs & communicating to plans

7

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

---

---

## Exchange Rollout “Glitches”\*

### Federally Facilitated Exchanges

- Error messages and delays
  - End-to-end testing only 2 weeks before launch
- No “browse” function creates a bottleneck
- Short-term crash of data services hub
- Federal SHOP: on-line purchasing through healthcare.gov delayed to 2015

\* “glitches” = understatement

8

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

---

---

## Example: Alaska FFE

- Individual Exchange
  - 2 issuers, 34 plans
    - Premera Blue Cross Blue Shield of AK; Moda Health
- Alaska metrics
  - NO Alaskans had been able to enroll in FFE in its first two weeks
  - 53 enrolled in the first month
- Subsidies were all miscalculated

9

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

---

---

## WA Specific Provisions

- Dental plans must be priced and offered separately (ACA is permissive)
- State market rules
- Benchmark plan: Regence Blue Shield *Innova* small group plan
  - With additions to meet EHBs
  - Already meets WA mandated benefits

10

---

---

---

---

---

---

---

---

---

---

## WA Health Benefit Exchange

- Individual Exchange
  - 8 issuers, up to 152 plans, plus 8 multi-state plan QHPs
    - Bridgespan (Regence Blue Shield); Premera Blue Cross and Lifewise; Group Health Cooperative; Molina; Coordinated Care (Centene); Community Health Plan of WA; Kaiser Permanente
  - 3 traditional Medicaid issuers
  - No platinum plans
  - 2 catastrophic plans (both HMOs)

11

---

---

---

---

---

---

---

---

---

---

## WA Health Benefit Exchange

- Small Business Health Options Program
  - 2-50 employees
  - Premium aggregation services
  - Employer decides level of coverage
    - Employees pick any plan offered within level
- SHOP – Healthplanfinder Business
  - 1 carrier, 2 counties
  - Expected to increase next year?

12

---

---

---

---

---

---

---

---

---

---



## Exchange Rollout

- Even including relative success of state-run exchanges, total QHP enrollment in the first month was one-fifth of what was expected (100,000 v. 500,000)
- Medicaid expansion has been a success – 396,000 found eligible in first month

16

---

---

---

---

---

---

---

---

## Plan Cancellation “Fix”

- Millions of plans cancelled despite President Obama’s campaign promise: “If you like your policy, you can keep it”
- Fix allows insurers to continue offering plans that don’t meet ACA requirements through 2014
- Many states declined to adopt the federal approach, including WA and CA

17

---

---

---

---

---

---

---

---

## Recent Exchange Regulatory Activity

- Proposed open enrollment period for 2015 – November 15, 2014 to January 15, 2015
- Proposed regulations on FFE SHOP for 2015
- Proposed regulations on stand-alone dental plan out-of-pocket maximums (\$300/child, \$400/children)

18

---

---

---

---

---

---

---

---

## Windsor: Demise of DOMA

- Section 3 of DOMA is unconstitutional
  - Federal government will now recognize same-sex marriages for purposes of federal law
  - 16 states and DC, as well as many foreign countries, allow same-sex marriages
  - 34 states not allowing same-sex marriages not required to recognize same-sex marriages
    - Oregon recognizes out-of-state marriages

19

---

---

---

---

---

---

---

---

## Controlling State Law

- To determine whether a couple is married, the federal government will use one of two possibilities
  - State of celebration (state in which the marriage occurred)
  - State of residence (state in which the couple currently lives)

20

---

---

---

---

---

---

---

---

## Controlling State Law: Example

- Couple married in Washington, lives in Oregon
  - State of celebration rule: couple is married
  - State of residence rule: couple is not married
- Federal government does not use the same rule across the board, but same-sex married couple living in same-sex marriage state will be married for all federal law purposes
  - Couples in non-same-sex marriage states are married under some federal laws and not others

21

---

---

---

---

---

---

---

---

## IRS and DOL *Windsor* Guidance

- For all federal tax and ERISA purposes, the federal government will use the state (and country) of celebration
  - Same-sex married couples will be recognized as married no matter where the couple lives or works
  - No recognition to DPs or civil unions
- FMLA: state of residence

22

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

---

---

## IRS *Windsor* Guidance and Health Plans

- Employer contributions for coverage of same-sex spouse and children of same-sex spouse are tax-free to employee
- Employee's contributions for coverage for same-sex spouse and children of same-sex spouse may be paid on a pre-tax basis through a cafeteria plan

23

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

---

---

## IRS *Windsor* Guidance and Health Plans

- Employers stopped imputing income as of September 16, 2013
- Employers may under-withhold after September 16, 2013 (but correction must be done by December 31, 2013)
- Employees need to file amended tax returns for previous years (no employer correction)

24

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

---

---



## IRS Windsor Guidance and Health Plans

- Employers do not need to issue amended W-2s for prior tax years
- Employers can recover employment taxes they paid on imputed income
  - Cost of recovering may exceed any tax refund for some employers

25

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

## IRS Windsor Guidance and Health Plans

- Other spousal rights in IRC: COBRA, HIPAA special enrollment
- Employee may now use HSA, HRA and health FSA funds for expenses of same-sex spouse and same-sex spouse's children
  - Waiting for more guidance on these issues
    - Effective date: January 1 or September 16?
  - Also DCAP and other fringe benefit issues

26

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

## IRS Windsor Guidance and Qualified Retirement Plans

- Federal spousal rights in retirement plans differ depending on type of plan
  - QDROs
  - Right to consent to non-spouse beneficiary
  - Joint and survivor annuities
- IRS to issue guidance on retroactive effect on retirement plans and any necessary plan amendments

27

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

## New HIPAA Privacy Rules

- HIPAA Omnibus Privacy Regulations issued in January 2013
- Compliance date: September 23, 2013
- Highlights of new rules
  - New enforcement rules
    - \$1.75M fine for health plan that returned copiers to leasing agent without stripping out protected health information ("PHI") from hard drives
    - \$1.5M fine for theft of unencrypted laptop
    - \$1.7M fine for USB hard drive stolen from employee's car

28

---

---

---

---

---

---

---

---

---

---

## New HIPAA Privacy Rules

- Major expansion of entities subject to the privacy and security rules
  - Most of the rules apply to business associates
  - New rule: rules apply to subcontractors of business associates
  - Example:
    - Third-party administrator hires subrogation subcontractor
    - Subrogation subcontractor hires law firm
    - Law firm hires document storage company
    - Document storage company hires shredding company
    - All are subject to HIPAA privacy and security rules

29

---

---

---

---

---

---

---

---

---

---

## New HIPAA Privacy Rules

- Individuals have a right to inspect and copy their PHI
  - Individuals now have a right to have their PHI sent to a third party
  - Individuals now have a right to electronic copies of their PHI

30

---

---

---

---

---

---

---

---

---

---

## New HIPAA Privacy Rules

- Action items
  - Amend business associate agreements
  - Revise and distribute new notice of privacy practices
  - Revise plan's privacy and security policies
  - Revise plan's breach notification policy
  - Train workforce on new rules

31

---

---

---

---

---

---

---

---

## HIPAA Wellness Program Rules

- Applicable to a wellness program that is, or is part of, a group health plan
- Three types of wellness programs
  - Participatory
    - Reward for attending cooking classes
  - Health-contingent: activity-only
    - Reward for walking
  - Health-contingent: outcome-based
    - Reward for not smoking

32

---

---

---

---

---

---

---

---

## HIPAA Wellness Program Rules

- Major changes from previous rules
  - Maximum reward increased from 20% to 30% of total premium (50% for non-smoking rewards)
  - Health-contingent outcome-based programs must offer alternative method to all who do not otherwise qualify for reward and must pay for the cost of the alternative method
    - Prior law: only had to offer alternatives to persons for whom program was inadvisable or unreasonably difficult due to a medical condition

33

---

---

---

---

---

---

---

---

## HIPAA Wellness Program Rules

- Example: reward for non-smokers
  - All smokers must be offered a reasonable alternative (smoking cessation program)
  - Plan must identify and pay the cost of smoking cessation program
  - Smoker gets 100% of reward upon completion of program, whether or not smoker quits smoking
    - No reward required if smoker drops out of program
    - Repeat next year

34

---

---

---

---

---

---

---

---

---

---

## \$500 Carryover in Health FSA

- New guidance allows carryover of up to \$500 in lieu of grace period in health FSA
  - No carryover allowed in DCAP
  - Must amend cafeteria plan by end of 2014 (for 2013 carryover)
  - Most employers waiting until end of 2014 to implement
    - IRS guidance too late for open enrollment

35

---

---

---

---

---

---

---

---

---

---

## \$500 Carryover in Health FSA

- \$500 is in addition to \$2,500/plan year maximum contribution
  - Continues into following plan years (\$500 carryover at end of 2013 can roll into 2015)
    - Can this be limited by plan provisions?
  - What if employee is ineligible for health FSA in next plan year?
    - COBRA?

36

---

---

---

---

---

---

---

---

---

---

## \$500 Carryover in Health FSA

- Likely to make employee and family members ineligible for HSA contribution for entire following plan year
  - Assuming balance (on cash basis) in FSA on December 31
  - Can carry over into a limited-purposed FSA
  - Disqualifies employee from premium tax credit?

37

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

---

---

## Exchange Notice

- Notice to all employees and new hires on exchanges
  - Explanation of exchange and services provided
  - Eligibility for premium tax credits
  - Impact of purchasing through exchange
- Distributed by October 1, 2013, to all existing employees and new hires as of October 1, 2013
- Regulatory guidance issued that there is no penalty for failure to send notice

38

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

---

---

## Exchange Notice

- Applicable to employers subject to Fair Labor Standards Act
- Distributed to all employees
  - Even if not eligible for health plan (e.g., part-time employees)
  - No distribution to dependents

39

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

---

---

## Exchange Notice

- Two model notices are available
  - Employers offering health plan
  - Employers not offering health plan
- Notices require specific information on employer and employer's health plan
  - Should contain information on the plan for 2014 (not 2013)
- New model COBRA election notice also available

40

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

## SBC for 2014 Coverage

- New SBC template for 2014 (distributed at the end of 2013)
  - Adds data elements requiring plan to disclose whether it
    - Constitutes minimum essential coverage; and
    - Provides minimum value
  - No new coverage examples

41

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

## 2014: Clinical Trials

- Plans may not deny right to participate in clinical trials
  - Must cover routine patient costs provided to participants not in a clinical trial
  - May not discriminate against the individual based on participation in the trial
  - Good-faith compliance; no regulations before 2014
  - Plan drafting challenge!!!

42

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

## 2014: Provider Discrimination

- Cannot discriminate against any health care provider acting within the scope of its license
  - Does not require plans or insurers to accept all types of providers into a network
  - Does not apply to provider reimbursement rates
  - Good-faith compliance; no regulations before 2014

43

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

## 2014: 90-Day Waiting Period

- Maximum 90-day waiting periods
  - No violation if employee is slow to enroll
  - Enrollment must be available by the 90th day, even if the middle of the month
    - Many plans are changing to the first day of the month following 60 days
  - Cumulative service hours of not more than 1,200 acceptable as eligibility requirement
    - Enrollment must be offered within 90 days

44

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

## 2014: PCEs

- No pre-existing condition exclusions for anyone (not just children)
  - HIPAA certificates of creditable coverage no longer required after December 31, 2014

45

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

## 2014: Individual Mandate

- Individuals must pay tax if they, their spouses, or their tax dependents do not have “minimum essential coverage”
  - Greater of percentage of income OR dollar amount multiplied by number of uncovered family members
    - 2014: 1% or \$95 (not to exceed 300% of \$95)
    - 2015: 2% or \$325
    - 2016: 2.5% or \$695
    - Capped at national average bronze-level plan premium
    - Flat dollar amount for individuals under 18 is half of these amounts
    - Tax imposed on monthly basis

46

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

---

---

## 2014: Individual Mandate

- Minimum essential coverage includes
  - Any employer-sponsored group health plan
  - Any government-sponsored plan, including Medicare Part A, Medicaid, CHIP, TRICARE
  - Policies in the individual market
  - State risk pool
  - Medicare Advantage
  - Self-funded student plans

47

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

---

---

## 2014: Individual Mandate

- Exemptions for:
  - Religious conscience
  - Health care sharing ministry participants
  - Taxpayers with income below filing threshold
  - Individuals who cannot afford coverage (contribution exceeds 8% of household income)
    - Compare to other affordability tests (9.5% of household income, 9.5% of wages)
  - Members of Indian tribes
  - 2014 ONLY, those who enroll late in open enrollment <sup>48</sup>

48

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

---

---



## 2014: Premium Tax Credit

- Federal subsidy to help individuals purchase insurance at the exchanges
  - HHS plans to pay premium tax credit amount directly to insurer to partially pay premiums when due

49

---

---

---

---

---

---

---

---

## 2014: Premium Tax Credit

- Eligibility for premium tax credit
  - U.S. citizens and legal residents whose income is between 100% (133%) and 400% of federal poverty level
    - \$46,000/individual; \$94,000/family of four
- But not eligible if:
  - Offered enrollment in an "affordable" employer-sponsored group health plan providing minimum value ("MV");
    - Offer also disqualifies all dependents who are eligible for the plan if they are also tax dependents of employee
  - Actually enrolled in an employer-sponsored health plan (regardless of MV or affordability); or
  - Eligible for other coverage (such as Medicare Part A, Medicaid) 50

---

---

---

---

---

---

---

---

## 2014: Premium Tax Credit

- Minimum value: health plan pays at least 60% of the total allowed costs of plan benefits
- Affordable coverage: cost for employee-only coverage of lowest health plan option does not exceed 9.5% of household income
  - No affordability test for family coverage

51

---

---

---

---

---

---

---

---

## One-Year Delay of Pay-or-Play

- Originally announced in a blog
  - Really?
- Information reporting requirements
  - IRC §§ 6055 and 6056
  - Require reporting by insurers, self-funded plans, government agencies and large employers to IRS and to employees

52

---

---

---

---

---

---

---

---

## One-Year Delay of Pay-or-Play

- Proposed regulations have been issued under IRC §§ 6055 and 6056
  - IRS trying to streamline reporting requirements
  - Would allow electronic reporting to employees, but only if employer has obtained prior consent of employee

53

---

---

---

---

---

---

---

---

## 2014 2015: Pay-or-Play Penalties

- Employer pay-or-play penalties apply to “applicable large employers”
  - Averaged 50 or more full-time equivalents on business days during previous calendar year
- Two types of pay-or-play penalties
  - No coverage penalty: IRC § 4980H(a)
  - Insufficient coverage penalty: IRC § 4980H(b)
  - Only apply for failure to offer coverage to full-time employees (30 hours/week, 130 hours/month)

54

---

---

---

---

---

---

---

---

## 2014 2015: VHS Employees

- Proposed regulations for variable hour and seasonal (“VHS”) employees
  - Measurement periods to determine whether these employees are full-time
    - 3-12 months
    - These should start in 2014 for purposes of pay-or-play penalties in 2015

55

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

---

---

## One-Year Delay: Action Items

- Delay eligibility changes relating to definition of FTE (30 hours a week)
- Delay changes to make plan affordable or provide minimum value
- Delay measurement periods for VHS employees until 2014, for stability periods in 2015

56

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

---

---

## 2014: TRP Fee

- Transitional Reinsurance Program (“TRP”) fee
  - To assist insurers who provide individual insurance to high-cost enrollees
  - To repay federal government for ERRP
- HHS will collect \$25B from 2014 to 2016 from health insurers and self-funded health plans
  - TRP fee is per capita (per covered life)
- Insurance company pays for insured plans, plan administrator for self-funded

57

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

---

---

## 2014: TRP Fee

- TRP fee for 2014
  - \$5.25 per month (or \$63 per year) per covered life in major medical coverage
    - \$52.50 in January 2015, \$10.50 late in 2015
- TRP fee for 2015
  - Proposed to be \$44 per year

58

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

---

---

## 2014: TRP Fee

- TRP fee not payable for persons whose coverage is secondary to Medicare
  - Retirees and COBRA participants
  - Agencies to propose regulations that
    - Clarify there is only one TRP fee per person if in two plans (i.e., insured medical and self-funded prescription drug)
    - Exempt certain self-funded, self-administered plans (no TPA)

59

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

---

---

## 2015: Mental Health Parity

- New regulations address several issues in current regulations
  - Interaction with ACA preventive care mandates for mental health
  - Intermediate care (residential treatment, intensive outpatient treatment)

60

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---

---

---

# QUESTIONS?

Please contact:

Howard Bye-Torre  
(206) 386-7631

[hbye-torre@stoel.com](mailto:hbye-torre@stoel.com)

61

Game Change: Understanding Exchanges & 2014 Health Plan Rules  
EMPLOYEE BENEFITS PLANNING ASSOCIATION • DECEMBER 5, 2013



---

---

---

---

---

---

---

---